No. 18-483

In the Supreme Court of the United States

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF ETHICS AND RELIGIOUS LIBERTY COMISSSION OF THE SOUTHERN BAPTIST CONVENTION, NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

in support of the Petitioners

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INTERESTS OF *AMICI CURIAE*[1]

The **Ethics and Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Scripture teaches that every person is an image-bearer of God and that the womb is his domain. SBC members believe God's knowledge of unborn life even precedes the creative act of conception. Therefore, abortion is incongruent with SBC beliefs. The ERLC is committed to upholding the freedom of Christian ministries who care for women in unplanned pregnancies because we believe mothers and their unborn children are known and loved by God.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service charities, colleges, seminaries, and independent churches. NAE

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[1] Pursuant to Supreme Court Rule 37, all Parties have received timely notice of intent to the file this brief and have consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred because made in the image of God, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every woman in America.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Indiana, are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations and people of faith, especially with respect to supporting contentious issues like abortion and laws regulating it.

The **Pacific Justice Institute** (PJI) is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold the view that each individual is of great value. To this end, PJI has engaged in extensive litigation involving the sanctity of life, including high profile cases involving end of life issues.

SUMMARY OF ARGUMENT

The States have compelling interests in preventing discrimination based on sex, race, and disability, even when individuals are otherwise exercising constitutional rights such as the right to contract and, in this instance, the right to abort. The Seventh Circuit thought this Court's abortion precedent, even though that precedent has never directly addressed the issue presented by the statute under review, holds that the abortion right overrides all others. That grievous error, which allows unborn children to be killed because of their sex or race or disability, should be corrected as soon as possible. This case also presents a suitable vehicle for considering whether *Roe* and *Casey* should be reevaluated and overruled, in whole or in part.

ARGUMENT

I. This Court Has Not Already Adjudicated the Acceptability of Preventing Discrimination on the Basis of Sex, Race, and Disability in Abortion, and the States Have Compelling Interests in Preventing It.

The Seventh Circuit panel overread this Court's prior abortion decisions when it held that prohibitions against discrimination based on sex, race, and disability of the unborn child were foreclosed. Each of these categories involve important interests, and those interests can and must be harmonized with the right to abortion.

A. Sex-selection Discrimination Against Females Is Real, and the States Have a Compelling Interest in Preventing It.

States have a compelling interest to prevent abortion from being used as a tool to discriminate against females. Several states have outlawed abortions whose motivation is sex discrimination,[2]

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[2] As reported by the Guttmacher Institute, ten states (Arizona, Arkansas, Illinois, Indiana, Kansas, North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota) currently have laws that ban abortions for reason of sex selection at some point in pregnancy. https://www.guttmacher.org/print/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly. The law in Arkansas has been preliminarily enjoined and is the subject of ongoing litigation. *See Hopkins v. Jegley*, No. 4:17–cv–00404, 2017 WL 3220445

and social science studies have shown that parents, when limiting the size of their families, often prefer one sex over another, normally male.[3] The most prominent example is China, where abortion has been officially encouraged, even mandated, as part of its one-child policy (more recently modified to a two-child limit).[4] The result of that policy has been a significant skewing of the gender composition of China's population toward males.[5] That, in turn, has had adverse consequences for its society at large.[6]

(E.D. Ark., July 28, 2017), *appeal filed*, No. 17-2879 (8th Cir., Aug. 28, 2017). The law of Illinois has been permanently enjoined.

[3] "If Americans could have only one child, they would prefer that it be a boy rather than a girl, by a 40% to 28% margin, with the rest having no preference or no opinion on the matter." Frank Newport, *Americans Prefer Boys to Girls, Just as They Did in 1941*, June 23, 2011, at http://news.gallup.com/poll/148187/americans-prefer-boys-girls-1941.aspx (reporting on results of Gallup poll).

[4] China began its one-child policy in 1980, restricting most families to only one child. Beginning in late 2013, China allowed couples to have two children if one of the parents had been an only child. In October 2015, the Chinese Government announced that it would allow all couples to have no more than two children beginning in 2016. *See generally* https://www.brookings.edu/articles/the-end-of-chinas-one-child-policy/ (Mar. 30, 2016).

[5] "According to China's 2010 Census, men currently outnumber women by at least 34 million, an imbalance in large part due to China's fertility policy (known as the one-child policy) and a preference for sons." Wash. Post, Apr. 30, 2014, https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/30/the-security-risks-of-chinas-abnormal-demographics/?utm_term=.5439d7504f17.

[6] "[O]ver the next 20 years in large parts of China . . . there will be a 10%–20% excess of young men. . . . It has also been

The laws and public policies of this country uniformly militate against sex discrimination.[7] States

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assumed that a combination of psychologic vulnerability and sexual frustration may lead to aggression and violence in these men. There is good empirical support for this prediction: cross-cultural evidence shows that the overwhelming majority of violent crime is perpetrated by young, unmarried, low-status males. In China . . . the sheer numbers of unmated men are a further cause for concern. Because they may lack a stake in the existing social order, it is feared that they will become bound together in an outcast culture, turning to antisocial behavior and organized crime, thereby threatening societal stability and security. . . ." Therese Hesketh, *et al.*, *The consequences of son preference and sex-selective abortion in China and other Asian countries*, *Canadian Med. Ass'n J.*, 2011 Sep. 6; 183(12): 1374–1377, at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3168620/ (footnotes omitted). "The crime rate has almost doubled in China during the past 20 years of rising sex ratios. . . . A study into whether these things were connected [*Sex ratios and crime: evidence from China's one-child policy*, by Lena Edlund, *et al.*, Institute for the Study of Labour, Bonn. Discussion Paper 3214] concluded that they were, and that higher sex ratios accounted for about one-seventh of the rise in crime." *The worldwide war on baby girls*, Mar. 4, 2010, at http://www.economist.com/node/15636231.

[7] *See, e.g.*, Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e *et seq.* (prohibiting employment discrimination based on sex); Title IX of the Educ. Amends. of 1972, *as amended*, 20 U.S.C. §§ 1681 *et seq.* (prohibiting sex discrimination in education programs or activities that receive federal financial assistance); Cal. Fair Emp't and Hous. Act, Cal. Gov't Code §§ 12900 *et seq.* (making it illegal for employers of five or more employees to discriminate against job applicants and employees on the basis of sex).

can legitimately regard it a compelling interest to protect against this discrimination against females by, for example, requiring a doctor to inform women that abortion is impermissible when the sex of the fetus is the motivating cause.[8]

B. Racial Discrimination in Abortion Is Real, and the States Have a Compelling Interest in Preventing It.

It needs no argument that prevention of racial discrimination is one of the interests our Republic holds most dear.[9] Indeed, the Civil War Amendments

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[8] For example, Arizona bans sex-selection abortions and requires both doctor and patient to sign an affidavit stating that the unborn child is not being aborted because of her or his sex or race. Ariz. HB2443, § 2 (2011), at https://www.azleg.gov/legtext /50leg/1r/bills/ hb2443p.pdf. As Arizona's prohibition of race as a motivation for abortion indicates, the disparity between abortion rates among the races also raises serious concerns that can legitimately be taken into account by a State. The most recent "Abortion Surveillance" report (for the year 2014) from the Centers for Disease Control and Prevention indicates that non-Hispanic black women have the highest abortion rate (26.7 abortions per 1,000 women aged 15–44 years) and ratio (391 abortions per 1,000 live births), both significantly higher than that for non-Hispanic white women. The CDC reports that non-Hispanic white women are the category with the lowest abortion rate (7.5 abortions per 1,000 women aged 15–44 years) and the lowest ratio (121 abortions per 1,000 live births). CDC, *Surveillance Summaries* 66(24);1–48, Nov. 24, 2017, at https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1.htm?s_cid=ss6624a1_w.

[9] *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

and the Civil Rights Acts of the 1860s and 1870s and the 1960s and 1970s voice that loud and clear.

It is ironic, then, that the Seventh Circuit has interpreted the Fourteenth Amendment, which was passed in large part to stamp out racial discrimination, to be in conflict with itself. It has ruled that the right to abort, which this Court has found springs implicitly from the Fourteenth Amendment, always trumps a right against racial discrimination which directly flows from it. The concurring judge below noted the irony of this fact,[10] but incorrectly believed this Court's precedent tied the court's hands to harmonize, or even balance, the two rights when in competition.[11] This Court should

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[10] In the Court of Appeals below, Judge Manion, concurring in part and dissenting in part, noted the following:

> Ranking member of the Senate Judiciary Committee Dianne Feinstein has often referred to *Roe* as 'super-precedent.' Of course, there's no such thing as 'super-precedent'—any case may be overruled by five Supreme Court Justices. But while *Roe* isn't super-precedent, it did spawn a body of jurisprudence that has made abortion the only true 'super-right' protected by the federal courts today. The purported right to an abortion before viability is the *only* one that may not be infringed even for the very best reason. For an unenumerated right judicially created just 45 years ago, that is astounding. . . . That today's outcome is compelled begs for the Supreme Court to reconsider *Roe* and *Casey*. But assuming the Court is not prepared to overrule those cases, it is at least time to downgrade abortion to the same status as actual constitutional rights.

888 F.3d at 311-313 (Manion, J., concurring and dissenting) (footnote omitted).

[11] Judge Manion below further noted "that Supreme Court

clarify on this important point.

C. Eugenics Is Real, and the States Have a Compelling Interest in Preventing It.

The eugenics movement lost much of its steam after it had been practiced so efficiently by the Nazis in Europe.[12] But it has come roaring back with abortion, both in Europe and in our own country. Indiana effectively demonstrates that with many statistics in its Petition with respect to those tested for Down Syndrome in utero.[13]

The eugenic practice of aborting children who are tested for potential genetic abnormalities is growing as such testing becomes cheaper and more widely available. Along with it, the cases of false positives for both genetic and physical pre-birth testing could be multiplied. This Court should not

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precedent compels us to invalidate Indiana's attempt to protect unborn children from being aborted solely because of their race, sex, or disability. That a narrowly drawn statute meant to protect especially vulnerable unborn children cannot survive scrutiny under [*Casey*] is regrettable." *Id.* at 310 (footnote omitted).

[12] *See Atkins v. Va.*, 536 U.S. 304 (2002) (finding imposition of death penalty on the mentally handicapped to be cruel and unusual). *But see Buck v. Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles is enough.").

[13] *See also* David Harsanyi, *Pro-Choicers Should Explain Why They Think Eugenics Is Acceptable-Iceland's 'Eradication' of Down Syndrome Raises Inconvenient Questions. At least, It Should*," Aug. 16, 2017, at http://thefederalist.com/2017/08/16/icelands-eradication-syndrome-raises-inconvenient-questions-pro-choicers/.

delay in reconciling the compelling interest in protecting the disabled with its previous decisions finding a right to abort.

II. This Case Provides an Appropriate Vehicle to Consider Whether Roe and Its Progeny Should Be Reevaluated and Overruled, in Whole or in Part.

The curtain has long ago been pulled back on *Roe* and its mid-course correction in *Casey*, exposing the historical and logical deficiencies of those decisions.[14] Although the Commissioner of the Department of Health is correct that this Petition could be granted and the Seventh Circuit's decision could be reversed without overruling *Roe* and *Casey*, this case provides an appropriate vehicle to consider whether overruling them, in whole or in part, is the better course of action. Either course of action would be available to this Court based on the Question Presented.

A recent article in the *The Georgetown Journal of Law and Public Policy* catalogues those failings in the template provided by this Court in determining whether to overrule its own precedent,[15] and *Roe* and *Casey* tick every box: (1) they are not settled

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[14] *See, e.g.*, Joseph W. Dellapenna, Dispelling the Myths of Abortion History (2006); Clarke Forsythe & Stephen Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. of Law & Pol. 301, 313–16.

[15] *See, e.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

precedent; (2) the original decisions were "wrongly decided," with neither being "well-reasoned"; (3) the schema they set out are not workable, but, rather, have caused confusion and conflict in the lower courts; (4) factual changes have eroded the original decisions; (5) legal changes have eroded the original decisions; and (6) reliance interests are not substantial.[16]

CONCLUSION

The Petition should be granted. It presents foundationally important questions about abortion and how the right to abortion can be harmonized with our Nation's compelling interests in preventing discrimination based on race, sex, and mental disability. The Court should also consider whether it should overrule its prior decisions in *Roe* and *Casey*, in whole or in part.

Respectfully submitted this
15th day of November 2018,

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[16] Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J. of L. & Pub. Policy 445 (2018).

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